Supreme Court, U.S.
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No. 93-1788

In The

# Supreme Court of the United States

October Term, 1993

HARRY E. BROWNLEE and ROY M. WADDELL,

*Petitioners,*

vs.

LEAR SIEGLER MANAGEMENT SERVICES CORP., a foreign corporation,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

For the reasons contained in the Argument below, Respondent, Lear Siegler Management Service Corp. ("Respondent"), disagrees with Petitioners' formulation of the questions presented for review.

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## STATEMENT OF THE CASE

Following denial of their claims before the Equal Employment Opportunity Commission, Petitioners Harry Brownlee and Roy M. Waddell brought suit in District Court, alleging employment discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, and breach of contract. Petitioners consented to assignment of their case to a Magistrate Judge pursuant to 28 U.S.C. § 636(C)(1).

The undisputed facts upon which the Magistrate Judge based his decision in sustaining Respondent's Motion for Summary Judgment are contained in Appendix "D" to the Petition for Certiorari, pages D3 - D8. The Magistrate Judge's findings were accepted by the Court of Appeals (Petition, App. "A"). Unless otherwise noted, the following references are to the opinions of the lower courts.

Both Petitioners were hired by Respondent in February, 1990 under three (3) year term contracts to perform services in Saudi Arabia under the control and direction of the Royal Saudi Air Force ("RSAF"). Prior to hiring Petitioners, Respondent had entered into a contract with the United States Air Force to provide logistics support to the RSAF in Saudi Arabia (Petition, D-3).

The employment contracts signed by Petitioners contained a termination provision which, *inter alia*, gave Respondent the right to terminate Petitioners if Respondent was directed to do so by the Saudi Arabian Government. Allegations in Petitioners' Statement of the Case (Petition, pp. 8-9) about the adhesive nature of the

employment contracts and representations by Respondent concerning the contracts are not supported by the record and were of no consequence to the lower courts or to the issues presented here.

Because of the nature of the work, most of the persons hired by Respondent were retired military personnel and the average age of Respondent's employees in Saudi Arabia was 44 years. One of Petitioners, Brownlee, was 52 years old at the time of termination, the other, Waddell, was 56.

Shortly after Petitioners' commenced work on an RSAF base, RSAF personnel advised the United States Air Force contract representative and Respondent that Petitioners were unsuitable for their employment and demanded their removal from the country.

Notwithstanding efforts by the United States Air Force representative and Respondent, RSAF refused to reconsider the decision to terminate Petitioners or even to discuss it further. Thereupon, Petitioners were terminated and returned to the United States. The claim in the Petition (Petition, p. 9) that Petitioners were " . . . confronted with the claim of the RSAF management that they were 'too old' " is misleading and not supported by the record. Alleged oral statements to this effect were held by the Magistrate Judge to be inadmissible hearsay, and Petitioners did not contest that ruling in the Court of Appeals.

Likewise, mistaken is Petitioners' assertion that both were replaced by younger men. While Brownlee (aged 52) was undisputedly replaced by a 41 year old, Respondent's personnel records reflect that Waddell (aged 56)

was replaced by a 61 year old. Based solely on a letter written to the EEOC, Waddell contended his replacement was *only* 51 (Petition, D-7).

One matter which has been agreed upon from the beginning of this action was that Petitioners were suitable for the work, and that, as far as Respondent could determine, were performing their work in a satisfactory manner (Petition, D-5).

Contrary to assertions in Petitioners' Statement of the Case (Petition, p. 11), there is no evidence that the representative of the United States ordered or directed Saudi Arabia to admit Petitioners to the RSAF facility to which they were assigned. Nor is there any evidence that the USAF possessed the right to issue such an order to the RSAF.

Upon their return, Petitioners timely filed an age discrimination complaint with the Equal Employment Opportunity Commission, which denied the claims. Then followed the action in the District Court in which Petitioners sought relief under ADEA and damages for breach of contract.

Respondent moved for summary judgment, alleging that the undisputed facts established that Respondent had not been responsible for Petitioners' discharge and, in fact, had opposed the RSAF directive to terminate Petitioners. In addition, Respondent contended that the undisputed facts negated the contract claim.

Respondent also filed a motion in limine to exclude all three items upon which Petitioners based their contention that their discharge had been prompted by age considerations. These items consisted of alleged verbal statements by an RSAF sergeant and an RSAF major to Petitioners and a letter allegedly written by an RSAF lieutenant colonel to another RSAF lieutenant colonel. In responding to the motion in limine, Petitioners made no effort to justify admissibility of the oral statements and contested only the argument that the letter was inadmissible (Petition, E-8).

In sustaining Respondent's motion for summary judgment the Magistrate Judge held that, because it was undisputed that Petitioners lost their jobs as a result of the RSAF's direction (over Respondent's objection), Respondent could not be held liable under ADEA, because the bias of RSAF, if any, was not imputable to Respondent (Petition, D-17).

In addition, the Magistrate Judge found that the termination provisions in Article VI of the employment agreements were unambiguous, entitling Respondent to discharge Petitioners when directed to do so by the Saudi Government (Petition, D-19). The Petitioners' assertion in their Statement of the Case (Petition, p. 15) that they were "improperly terminated without valid reason" is not only unsupported by the record but contrary to the finding of the Courts below.

In a related decision sustaining Respondent's Motion in Limine (Petition, App. "E"), the Magistrate Judge held that the letter written by one RSAF officer to another RSAF officer was not admissible in evidence, because the

letter had not been authenticated and constituted inadmissible hearsay (Petition, E-5 - E-8). Although noting that Petitioners had not opposed that part of the motion directed to the alleged oral statements, the Magistrate Judge ruled that the alleged oral statements were hearsay and inadmissible in any event (Petition, E-8).

After entry of the Magistrate Judge's Order sustaining Respondent's Motion in Limine and Motion for Summary Judgment, Petitioners appealed to the Court of Appeals for the Tenth Circuit. There, Petitioners waived oral argument and did not file a reply brief.

On appeal, Petitioners urged that material questions of fact precluded Summary Judgment and that the Magistrate Judge erred in holding the letter inadmissible. Petitioners did not contest the ruling that the oral statements were inadmissible.

The Court of Appeals reviewed de novo the order sustaining Respondent's Motion for Summary Judgment (Petition, A-4) and affirmed the Magistrate Judge's decision. Accepting the Magistrate Judge's findings of undisputed fact, the Court of Appeals agreed that the allegedly improper motive of the Saudi Government could not be imputed to Respondent (*Id.*, A-8) and that Respondent had justifiably acted under the termination clause of the employment agreements in terminating Petitioners (*Id.*, A-9). The Court specifically rejected the assertion that the termination clause was invalid, finding no conflict between that clause and Respondent's contract with RSAF. (*Id.*, A-11).

In rejecting Petitioners' assertion that the RSAF's alleged discriminatory animus should be imputed to

Respondent, the Court of Appeals found that Petitioners could not "cite a single authority or even present a developed argument" in support of their position and that their contention was only an "unsupported conclusory assertion" and was "not adequate appellate argument." (*Id.*, A-6).

Finding it unnecessary to consider the evidentiary question of admissibility of the letter written by one RSAF officer to another, the Court of Appeals did not review the order sustaining Respondent's Motion in Limine (Petition, A-9).

Petitioners did not seek rehearing in the Court of Appeals before filing the Petition for Certiorari.

## REASONS FOR DENYING THE WRIT

### I.

### THE QUESTIONS PRESENTED FOR REVIEW BY THE PETITION ARE ARGUMENTATIVE, UNSUPPORTED BY THE RECORD AND WERE NOT EVEN DECIDED BY THE COURT OF APPEALS.

Notwithstanding the directive of Rule 14.1(a), Rules of the Supreme Court, the Petition presents four highly argumentative questions for review, all of which assume facts not in the record.

Petitioners' first two "questions" incorrectly assume that Respondent "delegated" its control over Petitioners to the government of Saudi Arabia. In fact, as the Magistrate Judge specifically found (Petition, D-3), Respondent's contract with the USAF obligated Respondent to

provide personnel " . . . to work under the functional and supervisory control of the RSAF. . . . " These "questions" also assume that there was evidence of age related bias by RSAF and that Respondent had knowledge of such bias; in fact, there was, as a result of the ruling on the Motion in Limine, no admissible evidence that Petitioners were terminated because of their age (Petition, D-17 and App. "E").

The third "question" argumentatively and without factual justification, assumes that the employment contracts between Petitioners and Respondent were drawn to "circumvent" provisions of the contract between the United States and Respondent. Nothing in the Record or the decisions of the lower courts supports this assumption. Moreover, the Court of Appeals held that the alleged conflict between Respondent's contract with the USAF and the employment contracts was illusory (Petition, A-11).

The fourth of Petitioners' "questions" is likewise not supported by the Record, because the deposition was never used at trial and the document in question was never offered into evidence by Respondent. Moreover, the "question", which was apparently designed to raise an argument that admissibility was waived, was not even raised in the District Court and was not reached by the Court of Appeals.

Moreover, none of the four "questions presented for review" by Petitioners was either presented or considered by the Courts below. Instead, the only issues decided by the Court of Appeals were:

(a) Is the alleged age based bias of the Royal Saudi Air Force ("RSAF") in refusing to allow continued employment of Petitioners on a RSAF base imputable to Respondent so as to subject Respondent to liability under the Age Discrimination Employment Act, where Respondent hired such employees to work under RSAF control?

(b) Does the employment contract between Petitioners and Respondent permit Respondent to terminate Petitioners when directed to do so by the Saudi Arabian Government?

In addition, the District Court (per the Magistrate Judge) decided an additional issue which the Court of Appeals found it unnecessary to reach: Was the only substantive indicia of age related bias on the part of the RSAF, viz. a letter from one RSAF officer to another, inadmissible because it was unauthenticated and hearsay?

## II.

## BECAUSE OF THE "UNUSUAL SETTING" OF THIS CASE, NO IMPORTANT QUESTIONS OF FEDERAL LAW ARE PRESENTED BY THE PETITION FOR CERTIORARI.

Petitioners assert that the Writ of Certiorari should be granted because the Court of Appeals incorrectly decided issues of agency and federal law not previously addressed by the Supreme Court and which should be decided by the Supreme Court. Petitioners also contend that the Court of Appeals incorrectly interpreted and failed to apply the provisions of the contract between the

United States Air Force and Respondent. Petitioners conspicuously fail to explain why the Court should decide any of these so called issues.

As noted in the Court of Appeals' decision (Petition, A-6), this case arises from an "unusual setting". The factual setting is unusual in that it involves American nationals, hired by American contractors to work under the direction and control of a foreign government. The legal situation is unique as well, as evidenced by the fact that the Tenth Circuit's opinion is the first known decision under ADEA involving similar facts.

The case arises from a highly unusual tripartite arrangement among the United States Government, the Government of Saudi Arabia, and Respondent, Lear Siegler.

Petitioners signed three (3) year employment contracts with Lear to work in Saudi Arabia under the direction of the RSAF, in connection with Lear's contractual commitment with the United States Air Force to provide technical assistance in support of the RSAF. The United States in turn had an agreement with the Government of Saudi Arabia to provide logistical support to the RSAF.

Most of the employees hired by Respondent to work in Saudi Arabia were retired military, with the average age being somewhere near 44 years of age (Petition, D-8). The Petitioners were removed from their positions by the RSAF, over the objection of Lear and the United States Government representative. Under the uncontroverted evidence, as found by the Magistrate Judge and adopted by the Court of Appeals, Respondent "only terminated

the Petitioners because of directions by the RSAF and not because of their age." (Petition, A-4).

Only a limited number of persons are likely to work abroad under similar contracts. The fact that the persons hired are typically retired military personnel working under term contracts makes the possibility of other ADEA claims of this type remote. The obvious reason is that persons hired to work overseas under term contracts of two or three years are unlikely to be fired for age related reasons, especially if those persons were already in an age protected (over 40) status when hired.

While Petitioners cite a number of decisions (only one of which was cited to the Court of Appeals), none is contended to be directly in point. Instead, all the cases cited stand for the unremarkable proposition that acts of corporate agents (usually employees) are generally imputable to their employers for purpose of assessing liability under ADEA, 29 USCA §§ 621 *et seq.*, and similar acts. If anything, one of the cited decisions, *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360 (6th Cir. 1982), while not precisely in point, supports the decisions of the Courts below. In *York*, a trade association was held not to be the agent of its active members for purposes of imputing liability under ADEA, a result similar to that reached below. In any event, no conflict is shown to exist between or among any of the cited decisions and the decisions below.

For reasons which are self-evident, the other aspect of the Court of Appeals' decision, i.e., the finding that the employment contract was unambiguous and had not

been breached, has no national significance and requires no review.

Finally, Petitioners' argument that the RSAF letter was admissible (Petition, pp. 31-2), is not even stated as an issue in the "Questions Presented . . . " section of the Petition. This uncertainty over the issue Petitioners ask the Court to consider is itself reason enough to deny the Petition, especially when coupled with the absence of any cited authority, any demonstration of the issue's importance and the fact that the Court of Appeals bypassed the issue altogether.

In summary, this case presented a thoroughly unique factual situation, one which is unlikely to be repeated or to have any guiding precedential value for the law of age discrimination, contracts or evidence. Accordingly, Petitioners have failed to satisfy any of the criteria of Rule 10, Rules of the Supreme Court.

## CONCLUSION

This case does not merit the Court's time or attention to the merits. Accordingly, the Petition should be denied.

Respectfully submitted,

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